SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-353

DR. EDWARD F. SCHUBERT, Superintendent,
Central State Hospital, Waupun, Wisconsin,
Petitioner-Appellee,

vs.

MICHAEL JOHN KOVACH, JR.,
Respondent-Appellant.

ON PETITION FOR WRIT OF CERTIORARI TO AND APPEAL FROM THE WISCONSIN SUPREME COURT

JURISDICTIONAL STATEMENT AND RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court entered July 3, 1974, appears at 64 Wis. 2d 612 and 219 N.W. 2d 341 *sub nom. State ex rel. Kovach v. Schubert*. The complete opinion is set forth in the Petition (App. 101-126).

JURISDICTION

The petitioner-appellee invokes this court's certiorari jurisdiction pursuant to 28 U.S.C. sec. 1257 (3).

The respondent-appellant appeals pursuant to 28 U.S.C. 1257 (2) inasmuch as the Wisconsin Supreme Court upheld the validity of sec. 971.17 (2) of the Wisconsin statutes which relate to the reexamination and rehearing provisions for a person found not guilty by reason of mental disease or defect. Such statutes were attacked as violating the Due Process and Equal Protection provisions of the Fourteenth Amendment to the United States Constitution.

The Petition and Notice of Appeal were both filed within 90 days of the mandate of the Wisconsin Supreme Court which was issued on July 3, 1974. On October 1, 1974, Mr. Justice Rehnquist granted appellant's application for a 30 day extension in which to docket this appeal, to October 31, 1974.

QUESTIONS PRESENTED

[By Petition for Certiorari]

1. Do the provisions of sec. 971.17 (1), Wis. Stats., providing for the automatic commitment of criminal defendants found not guilty by reason of mental disease or defect without a hearing to determine present mental state and need for commitment, violate the Equal Protection and Due Process Clauses of the United States Constitution?

[By Appeal]

2. Do the provisions of sec. 971.17 (2), Wis. Stats. which place a high burden upon a person found not guilty by reason of mental disease or defect who desires to be

released from commitment, and which are higher than the standard required of persons civilly committed, violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the United States Constitution?

3. Was the ruling of the Wisconsin Supreme Court declaring the statutes pursuant to which the respondent-appellant was committed unconstitutional, but denying relief to the respondent-appellant, appropriate in view of the statutory procedure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article XIV of Amendments:

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Statutes

Section 971.17:

"**Legal effect of finding of not guilty because of mental disease or defect.** (1) When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section.

"(2) A reexamination of a defendant's mental condition may be had as provided in s. 51.11, except that the reexamination shall be before the committing court and notice

shall be given to the district attorney. The application may be made by the defendant or the department. The burden shall be on the defendant to prove that he may safely be discharged or released without danger to himself or others. If the court is so satisfied, it shall order the discharge of the defendant or his release on such conditions as the court determines to be necessary. If it is not so satisfied, it shall recommit him to the custody of the department.

"* * *"

STATEMENT

The Statement in the Petition for Certiorari is basically correct. The Wisconsin Supreme Court declared unconstitutional the provisions of sec. 971.17 (1), Wis. Stats., which provide for the automatic commitment of a person found not guilty by reason of mental disease or defect at the time of the criminal act without a finding of present mental illness. The court upheld the constitutional validity of the provisions of sec. 971.17 (2), which concern the hearing to determine whether a person who has been committed under sec. 971.17 (1), is no longer dangerous and thus can be released. The court finally denied all relief to respondent-appellant, holding that its decision was prospective only.

ARGUMENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. The Petitioner Lacks Standing To Seek Review Of The Order Denying The Petition For A Writ Of Habeas Corpus.

This action is one seeking the respondent's release through a writ of habeas corpus. The Wisconsin Supreme

Court denied the writ. While it is true that within the opinion of the court denying respondent relief it is stated that a section of the Wisconsin statutes is unconstitutional, it is equally clear that such a declaration was unnecessary to supporting the order denying the writ. In such circumstances the petitioner, who prevailed *below, cannot seek review in this Court.* As was stated by this Court in *Electrical Fittings Corporation v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939):

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."

In accord: Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 176 (1934); *Partmar Corp. v. Paramount Pictures Th. Corp.*, 347 U.S. 89,99 (1954).

It is apparent that the decision of the Wisconsin Supreme Court denying the petition for habeas corpus did not require a decision on the question of the constitutionality of the commitment procedures codified under sec. 971.17 (1), Wis. Stats. All the decision required was to decide that because the respondent had several times sought reexamination, he was not prejudiced by the lack of constitutionality of the commitment procedures. While respondent believes that to be an erroneous determination, the fact remains that the part of the decision which the petitioner desires reviewed is mere *dicta,* having no effect upon the underlying action. He thus lacks standing to seek review in this Court of the order denying the petition for habeas corpus.

II. The Decision Of The Wisconsin Supreme Court Declaring The Automatic Commitment Procedures Unconstitutional Is Manifestly Correct And Consistent With The Decisions Of This Court.

A. The statutory scheme.

While we agree with petitioner that the issues presented in this case are substantial and has application to a number of jurisdictions, it is apparent that the decision of the Wisconsin Supreme Court was correct and consistent with the line of cases decided by this Court following *Baxstrom v. Herold*, 383 U.S. 107 (1966).

It must be emphasized that unlike most other jurisdictions the Wisconsin statutory procedures codified under sec. 971.17 (1), Stats., provide for mandatory indefinite commitment for a period not to exceed the maximum penalty for the offense charged. No decision was made that the defendant was mentally ill or dangerous at the time he was committed — he was committed regardless of his mental state. This was not a temporary evaluation to determine the defendant's condition — it was a permanent commitment to a hospital for the criminally insane.

B. The Wisconsin decisions are consistent with more recent decisions of other courts.

While petitioner suggests that there is a split of opinion among jurisdictions as to the constitutionality of the automatic commitment procedures, it is apparent that any question

of constitutionality has been put to rest by *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, this Court specifically adopted the reasoning now attacked by the petitioner, at 406 U.S. 727 (App. 106). In fact, the decision in *Jackson* was the basis for the Wisconsin court reversing its decision as to the constitutionality of these procedures from its decision in *State ex rel. Schopf v. Schubert*, 45 Wis. 2d 644, 173 N.W.2d 673 (1970), in which these same procedures were upheld when attacked as unconstitutional.

It must be noted that *all* of the cases relied upon by the petitioner were decided before *Jackson* and that both the Wisconsin court in this case and the Arizona Supreme Court in *State v. Clemons*, 110 Ariz. 79, 515 P.2d 324 (1974) squarely held that *Jackson* requires the result that such statutes are unconstitutional. Thus any split of authority is vitiated by the clear statement in *Jackson* supporting the decision in this case.

C. The decision in this case is entirely consistent with the "Baxstrom Principle."

The constitutional principle applied by the Wisconsin Supreme Court in this case has its genesis in this Court's decision in *Baxstrom v. Herold*, 383 U.S. 107 (1966). Mr. Justice Blackmun summarized the "*Baxstrom* Principle" in this Court's decision in *Jackson v. Indiana*, 406 U.S. 715, 724:

> "Rejecting the State's argument that Baxstrom's conviction and sentence constituted adequate justification for the difference in procedures, the Court said that 'there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.' 383 U.S. at 111-112 (additional citations omitted). The Court also

> held that Baxstrom was denied equal protection by commitment to an institution maintained by the state corrections department for 'dangerously mentally ill' persons without a judicial determination of his 'dangerous propensities' afforded all others so committed."

In a line of cases which includes *Baxstrom* and *Jackson* as well as such cases as *Specht v. Patterson*, 386 U.S. 605 (1967), and *Humphrey v. Cady*, 405 U.S. 504 (1972), the Court has made pellucid the fact that a difference in procedure cannot be justified by the defendant's criminal record or by the fact that his commitment is the result of proceedings in criminal, as opposed to civil, court.

The decision of the Wisconsin Supreme Court as written by Chief Justice Wilkie is entirely consistent with this line of cases which has proceeded directly from *Baxstrom* through *Jackson*. Any other result would be an obvious deviation from the teachings of this Court over the past decade. While petitioner asserts that the difference in procedure is justified, when that argument is analyzed, the *only* purported rationale for the difference in procedure is that the defendant has gone through the criminal process and has not been civilly committed. That is a rationale repeatedly rejected by this Court as a valid factor upon which to base a difference in procedure. Those state court opinions relied upon by the petitioner advance the same erroneous reasoning that petitioner asserts, and, again, all such opinions were decided prior to this Court's latest and most definitive decision in *Jackson* which not only retained the *"Baxstrom* Principle," but substantially expanded its application.

The decision of the Wisconsin court in this regard was entirely consistent with the law enunciated by this Court and any other result would require the abrogation of the *"Baxstrom* Principle" despite this Court's adherence thereto in every appropriate case since 1966.

D. The Wisconsin Supreme Court correctly held that the automatic commitment procedures violate due process of law.

It is also apparent that the Wisconsin court's determination that the automatic commitment procedures violate the Due Process Clause of the Fourteenth Amendment was clearly correct. In *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), this Court indicated that in order to comply with the Due Process Clause "a meaningful opportunity to be heard" must be provided. It is obvious that since the respondent was given no opportunity to be heard on the issue of whether he was "insane" at the time of his commitment or that he required such commitment, such a commitment violates even the strict rule of *Boddie*. There was no meaningful opportunity to be heard in this case, and sec. 971.17, Stats., contemplates no such hearing.

The due process analysis of this Court in *Jackson* is also on point and supportive of respondent's position. In holding that Jackson's automatic commitment as incompetent to stand trial was a violation of due process, the Court, at 406 U.S. 734-735, assailed such automatic commitments which place a criminal defendant in a mental institution without a finding that he was mentally ill or dangerous at the time — that is exactly what the Wisconsin statutes require. Again, as will be demonstrated below, the rehearing provisions certainly do not save the validity of the statutes. After discussing the various cases on the due process question, the Court concludes, at 406 U.S. 738, that the commitment of Jackson was invalid because there had been "no formal commitment proceedings" to determine his present status. Thus in *Jackson* the Court really gets us back to the *Boddie* test — a reasonable — a fair — opportunity to be heard and to require the state to show that Jackson there, or Kovach here, must be committed.

In *Morrissey v. Brewer,* 408 U.S. 471 (1972), this Court considered the question of when due process applied:

> "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970)," at 408 U.S. 481.

It is evident that the loss of liberty under sec. 971.17, Stats., and the resulting confinement in a maximum security hospital is such a "grievous loss" under any reasonable test.

This Court continues in *Morrisey* to point out that once it has been determined that due process does apply, the court must then turn its attention to the precise nature of the proceedings the constitution requires. There is, however, a basic point from which all due process must proceed. That point was identified in *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970):

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)."

Here there was no hearing at all, thus we need not determine exactly what type of hearing should have been afforded — although that might be a good idea. The lack of any hearing manifestly violates the Due Process Clause. The hearing must also be at the "meaningful time," i.e., the time of commitment.

It is thus submitted that the decision of the Wisconsin court in relation to due process was also correct and consistent with this Court's decisions.

JURISDICTIONAL STATEMENT

I. The Rehearing Provisions Codified As Sec. 971.17 (2), Wis. Stats., Violate The Due Process And Equal Protection Provisions Of The Fourteenth Amendments.

A. The issue.

The Wisconsin Supreme Court upheld the constitutionality of the provisions of sec. 971.17 (2), Wis. Stats., which relate to the procedure for seeking the reexamination of a person found not guilty by reason of mental disease or defect. Under the provisions of this statute a person so committed must sustain the burden of proving that "he may safely be discharged or released without danger to himself or others." At an initial civil hearing the state must prove beyond a reasonable doubt that the person is both ill and dangerous, *Lessard v. Schmidt,* 349 F.Supp. 1078, 1095 (E.D. Wisc., 1972). Upon rehearing in a civil case all the court must determine is that the "patient" is no longer in need of care and treatment, sec. 51.11 (5), Wis. Stats. It is thus manifestly apparent that the rehearing provided by sec. 971.17 (2) is nothing like an initial civil commitment hearing or a hearing afforded civilly committed persons upon petition for reexamination.

B. The issue is substantial and common to many jurisdictions.

The petitioner-appellee has argued that the issues involved in this case are important and has import to a number of jurisdictions. Of this there can be no doubt. It is just as apparent, however, that the rehearing provisions are equally

important and the issues raised by the Court's decision in this regard effect many jurisdictions.

In some respects the rehearing provisions of the statute is even more important because it has received less judicial scrutiny. As will be noted below, *Jackson v. Indiana* represents this Court's only prior opportunity to consider the ramifications of statutory schemes which make it easier for one class of persons to be committed, while at the same time making it more difficult for that same class to be released.

C. The decision of the Wisconsin court is contrary to the decisions of this Court.

1. The Court should have applied the "*Baxstrom* Principle" to the rehearing as well as the commitment procedures.

It is clear from this Court's decision in *Jackson* that the Wisconsin Supreme Court should have considered the equal protection question of the rehearing provisions in light of *Baxstrom*. In *Jackson*, the Court pointed out, at 406 U.S. 729-730:

> "*Baxstrom* did not deal with the standard for release, but its rationale is applicable here. The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release.
>
> ". . ., we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization

> without the showing required for commitment or the opportunity for release afforded by § 22-1209 or §22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment." (Footnote omitted.)

In rejecting this argument, the Wisconsin Supreme Court found only that this difference in procedure did not "shock the conscious" of the court, at 64 Wis. 2d 624 (App. 112). This extraordinary equal protection test, which finds support in neither the decisions of this Court nor earlier decisions of the Wisconsin Supreme Court, demonstrates the erroneous reasoning applied by the Wisconsin court. While there can be a question as to the test to be applied — the "rational relationship or compelling state interest" test — in these equal protection cases, nothing supports a "shock the conscious" equal protection evaluation. In fact, this test is rejected by the court in this same opinion in which it applied a different test to strike down the commitment procedures. We submit that the decision in relation to the rehearing procedures is erroneous and contrary to the decisions of this Court.

2. The shift in burden of proof is a denial of Due Process.

Appellant further contends that the statutory provisions which shifts the burden of proof from the state to the defendant are unconstitutional as a violation of due process of law because of the shift in burden. The constitutional bar to shifting the burden of proof in a criminal or civil case was discussed in detail by this Court in *Speiser v. Randall*, 357 U.S. 513, 523-524 (1958):

> " '[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Refining Co., 241 U.S. 79, 86, 36 S.Ct. 498, 501, 60 L.Ed. 899. The

> legislature cannot 'place upon all defendants in criminal cases the burden of going forward with the evidence * * *. [It cannot] validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.' Tot v. United States, 319 U.S. 463, 469, 63 S.Ct. 1241, 1246, 87 L.Ed. 1519. Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has 'proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' Morrison v. People of State of California, 291 U.S. 82, 88-89, 54 S.Ct. 281, 284, 78 L.Ed. 664. In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof. Western & A.R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884; cf. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78."

Under the provisions of sec. 971.17, Stats., appellant has *never* been shown to be dangerous, and yet he must prove that he is not dangerous to himself or others. Just how this burden is to be sustained is not clear. It is interesting to note that a person committed under sec. 971.17 can be released even though he is mentally ill, just as long as he can prove that he is not dangerous. Thus the defendant is first placed in the institution upon a showing that he was mentally ill at the time of the act, without a determination that he is dangerous at any time, and he can be released upon proving that he is not dangerous, without a determination being made that he is no longer mentally ill.

Not only has the legislature shifted the burden, it has shifted the basis for continuing commitment. The basis for commitment was mental illness while the basis for release is dangerousness. The rule discussed in *Speiser* and the other cases relied upon makes clear that such presumptions and change of burden are invalid. In the first instance the state must prove mental illness and dangerousness at the time of commitment, cf. *Lessard v. Schmidt, supra.* Unless and until that first burden has been sustained by the *state* it is improper and unconstitutional to place the burden upon the petitioner to negative the presumption assumed by the statutory scheme that he is both "mad and bad" — ill and dangerous. The rehearing provisions are hopelessly invalid.

II. The Mandate Of The Wisconsin Supreme Court Should Have Been Applied Retroactively.

A. The rehearing provisions do not suffice for the initial hearing.

The Wisconsin Supreme Court held that its determination that the commitment procedures are unconstitutional would be applied entirely prospectively and neither the appellant nor other persons committed under these invalid statutes would have their commitments vacated. The court based this determination on the availability of the rehearing provisions available under 971.17 (2), Wis. Stats., which were also attacked as being unconstitutional, but were upheld by the court.

It follows that if the appellant is correct in the immediately preceding section of the brief that the rehearing procedures are invalid, then the basis relied upon by the Wisconsin court has no viability. Thus if the Court notes jurisdiction and declares the rehearing provisions to be invalid, it will automatically apply the mandate to this appellant and other members of his class.

B. The declaration of unconstitutionality requires retroactive application.

It is also clear that the Wisconsin Supreme Court failed to follow its own cases and common law principles in denying the writ to the appellant. It is universally applied law that once a statute is declared invalid it is no longer effective, it is as if the law had not been passed, *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 21, 288 N.W. 454 (1939). It is quite certain that once the mandate of the Wisconsin Supreme Court had declared the statute invalid, such a statute could not be relied upon for any purpose or in any situation whatsoever, as the Wisconsin Supreme Court said in *John F. Jelke Co. v. Beck*, 208 Wis. 650, 661, 242 N.W. 576 (1932):

> "An unconstitutional act of the legislature is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and in legal contemplation has no existence."

In accord: Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); *Richardson v. United States*, 465 F.2d 844, 850 (3rd Cir., 1972); *Hietl v. United States*, 415 F.2d 664, 666 (5th Cir., 1969).

It is thus apparent that by declaring the statute pursuant to which the appellant was committed to be unconstitutional, the court was required to declare his commitment invalid and grant the writ. This is particularly so in view of the invalidity of the rehearing provisions.

CONCLUSION

For the reasons argued herein it is respectfully submitted that the Petition for a Writ of Certiorari to the Wisconsin Supreme Court should be denied, and that probable jurisdiction should be noted by this Court to review the denial of the petition for a writ of habeas corpus.

Respectfully submitted,

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